

# EXHIBIT B

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2  
3 UNITED STATES DISTRICT COURT  
4 SOUTHERN DISTRICT OF CALIFORNIA

5 JOANNE FARRELL, on behalf of  
6 herself and all others similarly situated,

7 Plaintiff,

8 vs.

9 BANK OF AMERICA, N.A.,  
10

11 Defendant.  
12  
13

CASE NO. 3:16-cv-00492-L-WVG

**JOINT DECLARATION OF CLASS  
COUNSEL JEFF OSTROW AND  
HASSAN ZAVAREEI IN SUPPORT  
OF PLAINTIFFS' UNOPPOSED  
MOTION FOR FINAL APPROVAL  
OF CLASS SETTLEMENT AND  
FOR APPLICATION OF  
ATTORNEYS' FEES AND COSTS  
AND SERVICE AWARDS**

14 Class Counsel, Jeff Ostrow and Hassan Zavareei, hereby declare as follows:

15 1. Pursuant to the Preliminary Approval Order, we are Class Counsel under the  
16 Settlement with Bank of America, N.A. ("BANA" or "Bank") being presented to the Court  
17 for Final Approval. We submit this declaration in support of the Memorandum of Points  
18 and Authorities in Support of Plaintiffs' Unopposed Motion for Final Approval of Class  
19 Settlement, Application for Attorneys' Fees and Costs and Service Awards  
20 ("Memorandum").<sup>1</sup> We have personal knowledge of the facts set forth in this declaration,  
21 and could testify competently as to them if called upon to do so.

22 **Background and Procedural History**

23 2. This Action seeking relief under the National Bank Act's ("NBA") usury  
24 provisions has been litigated for nearly two years. Class Counsel have been involved in other  
25

26 <sup>1</sup> The definitions and capitalized terms in the Settlement Agreement ("Agreement") and  
27 Memorandum are hereby incorporated as though fully set forth in this Order, and shall have  
28 the same meanings attributed to them in those documents.

1 litigation against major U.S. banks for almost a decade.

2 3. The litigation has been hard-fought. The Parties have engaged in motion  
3 practice, briefing pertaining to whether the Ninth Circuit would grant the Bank interlocutory  
4 appeal of the Order denying the Motion to Dismiss, extensive mediation briefing, and  
5 discovery.

6 4. Class Counsel is particularly experienced in the litigation, certification, trial, and  
7 settlement of nationwide class action cases. In negotiating this Settlement, Class Counsel  
8 had the benefit of years of experience litigating against national banks, including many cases  
9 involving the assessment of overdraft fees. Class Counsel also litigated and settled another  
10 class action against BANA involving a different BANA overdraft fee policy.

11 5. In litigating and resolving other consumer class actions against national banks  
12 involving overdraft fees, Class Counsel has been at the forefront of the NBA usury claims  
13 pertaining to continuous (a/k/a sustained) overdraft fees like the Extended Overdrawn  
14 Balance Charges (“EOBCs”).

15 6. Before filing suit, Class Counsel spent many hours investigating the usury  
16 claims of several potential plaintiffs against the Bank. Class Counsel interviewed a number  
17 of customers and potential plaintiffs to gather information about the Bank’s conduct and its  
18 impact upon consumers. This information was essential to Class Counsel’s ability to  
19 understand the nature of the Bank’s conduct, the language of the Account agreements at  
20 issue, and potential remedies. In addition, Class Counsel also expended significant resources  
21 researching and developing the legal claims at issue.

22 7. Class Counsel conducted a thorough investigation and analysis of Plaintiffs’  
23 claims and engaged in extensive briefing on the fundamental legal issue of whether the  
24 EOBCs are a usurious charge, data analysis with the assistance of Plaintiffs’ expert, and  
25 confirmatory discovery with the Bank. Class Counsel’s review enabled it to gain an  
26 understanding of the law and evidence related to central questions in the case, and prepared  
27 it for well-informed settlement negotiations. Class Counsel was also well-positioned to  
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1 evaluate the strengths and weaknesses of Plaintiffs' claims, and the appropriate basis upon  
2 which to settle them, as a result of their litigating similar claims in courts across the country.

3 8. Class Counsel led the investigation that resulted in this Action. Indeed, Class  
4 Counsel persisted to pursue the usury claim even after three other district courts had rejected  
5 it in other cases. *See McGee v. Bank of Am., N.A.*, 2015 WL 4594582 (S.D. Fla. July 30, 2015),  
6 *aff'd* 674 Fed. Appx. 958 (11th Cir. Jan. 18, 2017); *Shaw v. BOKF, Nat'l Ass'n*, 2015 WL  
7 6142903 (N.D. Okla. Oct. 19, 2015); *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 150  
8 F. Supp. 3d 593, 641-642 (D.S.C. 2015). Since then others lost on the same theory. *See*  
9 *Johnson v. BOKF, N.A. d/b/a Bank of Texas*, No. 3:17-cv-663, Dkt. No. 30 (N.D. Tex. Oct.  
10 24-2017); *Moore v. MB Fin. Bank, N.A.*, No. 17 C 4716, 2017 U.S. Dist. LEXIS 189585 (Nov.  
11 16, 2017); *Dorsey v. T.D. Bank, N.A.*, No. 6:17-cv-01432, Dkt. No. 30 (D.S.C. Feb. 28, 2018),  
12 *appeal filed*, Case No. 18-1356 (4th Cir.); *Fawcett v. Citizens Bank, N.A.*, No. 17-11043, Dkt.  
13 No. 37 (D. Mass., Apr. 19, 2018). To date, six federal courts have granted seven separate  
14 motions to dismiss similar cases holding that the respective banks' charges were not interest  
15 and therefore not subject to the NBA's usury limit.

16 9. In *McGee*, the U.S. Court of Appeals for the Eleventh Circuit affirmed the  
17 Florida district court's judgment of dismissal on the same issue. *McGee v. Bank of Am., N.A.*,  
18 2015 WL 4594582 (S.D. Fla. July 30, 2015), *aff'd* 674 F. App'x 958 (11th Cir. Jan. 18, 2017).  
19 This Action is the only one of its kind that has survived to date, and the only one in which a  
20 defendant bank has agreed to pay cash and cease the very practice at the heart of the  
21 complaint. Considering this precedent, Class Counsel took a great risk in even filing this  
22 Action in the first instance, and the results obtained, including the notable cessation of  
23 charging EOBCs, is even more extraordinary. So not only were the claims in this litigation  
24 untested and novel, but it took Class Counsel a substantial amount of pre-filing work to  
25 research and develop the legal arguments and claims to support the finding that EOBCs  
26 were interest. Nonetheless, Class Counsel developed this case and the few others like it,  
27 relying on their unique expertise in consumer banking practices and litigation related thereto.

1 Once the Action was on file, Class Counsel then fought to overcome the Bank's vigorous  
2 protestations that the case was wrong-headed; and persisted in driving the hard bargain that  
3 resulted in this Settlement. Not one other firm or governmental entity brought or  
4 prosecuted these claims. In short, without Class Counsel's hard work, and investment of  
5 resources, BANA's alleged misconduct would have gone without recompense.

### 6 **The Settlement**

7 10. Plaintiffs settled the Action with the benefit of important informal discovery  
8 resulting in an expert analysis of key documentation and data regarding the Bank's  
9 assessment and collection of EOBCs. The review of this information and data positioned  
10 Class Counsel to evaluate with confidence the strengths and weaknesses of Plaintiffs' claims  
11 and prospects for success at class certification, summary judgment, and trial. As noted  
12 above, confirmatory discovery conducted after the Parties executed the term sheet agreeing  
13 to the material terms of settlement further aided Plaintiffs' analysis.

14 11. The Settlement in this case is the result of intensive, arm's-length negotiations  
15 between experienced attorneys who are familiar with class action litigation and with the legal  
16 and factual issues of this Action.

17 12. The Parties engaged in a full day formal mediation before an experienced and  
18 respected mediator, Honorable Layn Phillips (Ret.). At the mediation in Newport Beach,  
19 California, there were five members of Class Counsel present. The Bank had nearly the same  
20 number of people representing its interest. Although the Parties did not settle that day,  
21 much progress was made laying the foundation to the eventual resolution of this Action.  
22 The Parties continued their settlement discussion for a couple of months with the assistance  
23 of Judge Phillips.

24 13. The parties negotiated and executed a term sheet confirming the material terms  
25 of settlement on October 19, 2017.

26 14. After the Parties executed the term sheet, Class Counsel performed  
27 confirmatory discovery at the Bank's headquarters in Charlotte, North Carolina.

15. The Parties then turned to drafting the Agreement. On October 31, 2017, the Parties signed the Agreement.

## Terms of the Settlement

16. Under the terms of the Agreement, the Bank has agreed to stop assessing the EOBC charge on consumer checking accounts. For a period of five years, from December 31, 2017, through December 31, 2022, the Bank will not implement and/or assess EOBCs, or an equivalent fee, in connection with accounts.

17. The Bank has agreed to make \$29.1 million dollars in Debt Reduction Payments for money it claims is owed for outstanding EOBCs assessed against Settlement Class members whose accounts have been closed. Settlement Class members who incurred an EOBC after February 14, 2014, and had their accounts closed by the Bank and still had an uncollected EOBC outstanding, will have their outstanding balance reduced by an amount of up to \$35. If the account balance is less than \$35, the Bank will adjust the account to reflect a \$0.00 account balance. Further, to the extent BANA has reported the accounts to any credit bureaus, BANA will update the reporting.

18. In addition to the \$29.1 million of Debt Reduction, the total Settlement Amount of \$66.6 million includes a \$37.5 million cash Settlement Fund. The Settlement provides for automatic delivery, without a claims process, to Settlement Class members of the Settlement benefits. Should residual funds remain following a second distribution, or in the event a second distribution is not economically feasible, it is the intent of the Parties that the funds shall be distributed to *cy pres* recipient, Consumers for Responsible Lending ([www.responsiblelending.org](http://www.responsiblelending.org)), a non-profit organization that provides a national voice against abusive financial practices.

19. The cash Settlement Fund will be used to pay: (a) Settlement Class members their respective share of the Net Cash Settlement Amount; (b) Class Counsel for any Court awarded attorneys' fees and litigation costs; (c) any Court awarded Service Awards for the Class Representatives; and (d) any Administrator Hourly Charges. The Bank funded the

1 cash Settlement Fund on January 10, 2018.

2 20. Administration Costs shall be paid separately by the Bank, except for any  
3 hourly services requested of the Administrator. The Parties currently estimate the  
4 Administration Costs to be paid by the Bank at approximately \$2 million.

5 21. Class Counsel is requesting \$14.5 Million for attorneys' fees, as well as  
6 reimbursement of litigation costs and expenses incurred in connection with the Action  
7 totaling \$53,119.92. The Parties negotiated and reached agreement regarding attorneys' fees  
8 and costs only after agreeing on all material terms of the Settlement.

9 **Risks of Continued Litigation**

10 22. Continued litigation would have required tremendous time and expenses for  
11 both sides associated with contested class certification proceedings and possible  
12 interlocutory appellate review, completing merits discovery, pretrial motion practice, trial,  
13 and final appellate review.

14 23. Plaintiffs and Class Counsel are confident in their case, but are also pragmatic  
15 in their awareness of the Bank's various defenses, and the risks inherent to litigation of this  
16 magnitude that challenges engrained banking industry practice.

17 24. Plaintiffs faced the risk of losing during the pending appeal of the Order  
18 denying the Motion to Dismiss, at summary judgment, at trial, or on a subsequent appeal  
19 based on various theories and defenses advanced by the Bank.

20 25. Each of these risks, by itself, could have impeded the successful prosecution of  
21 these claims at trial and in an eventual appeal—resulting in zero benefit to the Settlement  
22 Class. Under the circumstances, Plaintiffs and Class Counsel appropriately determined that  
23 the Settlement reached with the Bank outweighs the gamble of continued litigation.

24 26. The traditional means for handling claims like those at issue here would tax the  
25 court system, require a massive expenditure of public and private resources, and—given the  
26 relatively small value of the claims of the individual members of the Settlement Class—could  
27 be impracticable.

1           27. The Settlement provides immediate and substantial benefits to approximately  
2 seven million Bank customers. The proposed Settlement is the best vehicle for the  
3 Settlement Class to receive the relief to which they are entitled in a prompt and efficient  
4 manner.

5           28. Whether the Action would have been tried as a class action is also relevant in  
6 assessing the fairness of the Settlement. As the Court had not yet certified a class at the time  
7 the Agreement was executed, it is unclear whether certification would have been granted and  
8 if granted, whether it would have withstood appellate scrutiny in the likely event of an appeal  
9 by the Bank. This litigation activity would have required the Parties to expend significant  
10 resources and risk further uncertainty.

11           29. Based on the Bank's data, Class Counsel estimates that the Settlement Class'  
12 most likely recoverable damages at trial would have been \$725,508,808.51. This figure was  
13 derived from Class Counsel's confirmatory discovery that resulted in BANA furnishing the  
14 Declaration of Riaz Bhamani, a BANA employee, an exhibit to the Memorandum. This  
15 figure was calculated by aggregating the total EOBCs assessed multiplied by the amount of  
16 each EOBC and then factoring in the total amount of chargeoffs and refunds. That most  
17 likely recoverable damages figure is dwarfed by the \$1.2 billion that will be saved in EOBCs.  
18 BANA has agreed to cease charging during the five-year period commencing December 31,  
19 2017.

20           30. Even counting *only* the direct financial payments that will be made as a result of  
21 the Settlement—\$66.6 million in payments and account credits to Settlement Class members  
22 and another approximately \$2 million in Administration Costs paid by the Bank—Plaintiffs  
23 and Settlement Class members are recovering approximately 9% of their most probable  
24 damages, without further risks attendant to litigation.

25           31. The benefits of settlement in this case outweigh the risks and uncertainties of  
26 continued litigation, as well as the attendant time and expenses associated with contested  
27 class certification proceedings and possible interlocutory appellate review, completing merits  
28



discovery, pretrial motion practice, trial, final appellate review by providing of substantial current and future relief to almost seven million Bank customers without further delay.

**Class Treatment is Appropriate**

32. As stated previously, Class Counsel has significant experience litigating class claims, including numerous claims against national banks, through their active roles similar class actions throughout the country. *See also* Firm Resumes of Class Counsel [DE #80-4, 80-5, 80-6, 80-7]. In litigating these cases, Class Counsel has been at the forefront of litigating NBA usury claims pertaining to continuous (a/k/a sustained) overdraft fees like the EOBC.

33. Class Counsel possesses extensive knowledge of and experience in prosecuting class actions in courts throughout the United States, and have recovered hundreds of millions of dollars for the classes they represented. In addition, Class Counsel includes firms with appellate expertise, which was used to extensively analyze the chances of success in both in the Ninth Circuit and the U.S. Supreme Court. The experience, resources, and knowledge Class Counsel brings to this Action is extensive and formidable. Class Counsel is qualified to represent the Settlement Class and has, along with the Class Representatives, vigorously protected the interests of the Settlement Class.<sup>2</sup>

34. The Administrator has overseen the Notice Program. The Notice Program is designed to provide the best notice practicable, and is tailored to take advantage of the information the Bank has available about the Settlement Class.

35. The Notice Program constituted sufficient notice to all persons entitled to notice. The Notice Program satisfied all applicable requirements of law, including, but not

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<sup>2</sup> Class Representative Joanne Farrell (“Farrell”) passed away January 18, 2018. Farrell passed away intestate and is survived solely by her adult children. Farrell vigorously protected the interests of the Settlement Class before her death, and a motion has been filed to substitute her adult children as Plaintiffs and Class Representatives pursuant to Fed. R. Civ. P. 25. [DE #100]. The motion had not yet been ruled as of the time the Motion and Memorandum were filed.

1 limited to, Federal Rule of Civil Procedure 23 and constitutional due process.

2 36. The Notice Program was completed pursuant to this Court's instructions in the  
3 Preliminary Approval Order, and was comprised of three parts: (1) email notice ("Email  
4 Notice") designed to reach those Settlement Class members for which the Bank maintains  
5 email addresses; (2) direct mail postcard notice ("Postcard Notice") to all Settlement Class  
6 members for whom BANA did not provide an email address and those who were sent an  
7 email that was returned undeliverable; and (3) a "Long Form Notice" containing more detail  
8 than the two other notices that has been available on the Settlement website  
9 (*www.eobcsettlement.com*) and via U.S. mail upon request.

10 37. Names and direct contact information for members of the Settlement Class  
11 were identified by the Bank. Individual Notice was sent to virtually all members of the  
12 Settlement Class as name and direct contact information was identified for more than 99.9%  
13 of all Accounts included in the Settlement Class.

14 38. The Notice properly informed and continues to inform members of the  
15 Settlement Class of the substantive terms of the Settlement. It advised members of the  
16 Settlement Class of their options for opting-out of or objecting to the Settlement, and how  
17 to obtain additional information about the Settlement. The Notice Program was designed to  
18 reach a high percentage of the Settlement Class and exceeded the requirements of  
19 constitutional due process.

20 39. The Administrator also worked with Class Counsel to communicate with  
21 Settlement Class members who had questions the Administrator could answer.

22 40. Further, the injunctive relief provided for in the Settlement is warranted  
23 because until agreeing to cease the practice for the Settlement, BANA's EOBC policy was  
24 uniformly applied to all Settlement Class members. BANA has agreed, subject to Final  
25 Approval, to change its business practices beginning on or before December 31, 2017,  
26 agreeing not to implement or assess EOBCs, or any equivalent fee, in connection with  
27 BANA consumer checking accounts, for a period of five years, or until December 31, 2022.

### Objectors

41. A total of 13 individuals have lodged objections to the Settlement, 11 of which are timely and two of which are untimely. Timely Objector Khobragade has since notified Class Counsel of his intention to withdraw his objection. The objectors are either (1) represented by “professional objector” counsel, who routinely object to settlements not out of concern for class members but to advance their own financial or ideological interests, or (2) pro se objectors, whose concerns are not grounds to deny approval and, in some cases, are not even true objections.

<b>Professional Objectors</b>	<b>Represented by</b>
Rachel Threatt	Ted Frank
Amy Collins	Timothy Hanigan and Chris Bandas
Stephen Kron	Caroline Tucker
Steven Helfand	An attorney appearing <i>pro se</i>
Estefania Osorio Sanchez	Michael Luppi and Albert Bacharach
<b>Pro se Objectors</b>	
Shenita Thompson	
Ashwin Khobragade	
George O'Dell	
Bruce Ebneter	
Algerine Romero	
Ochiochioya Eidon	
<b>Untimely Pro se Objectors</b>	
Michael Colley	
Mark Gullickson	

42. Objector Estefania Osorio Sanchez [DE #88] is represented by professional objectors Michael Luppi and Albert Bacharach. Mr. Bacharach did not appear in the paperwork for Ms. Sanchez’s objection, but when Class Counsel attempted to schedule a mediation with the objectors, Mr. Bacharach contacted Class Counsel claiming to represent Ms. Sanchez.

43. Although Class Counsel had suspicions regarding the professional objectors’

1 motives, Class Counsel reached out to all objectors in an effort to mediate the objections  
2 and address their concerns prior to final approval with the hope of avoiding an appeal that  
3 would delay recovery by the class.

4 44. On May 15, 2018, counsel for all of the professional objectors—except for Ted  
5 Frank, who refused to attend the mediation or even discuss his objection with Class  
6 Counsel—participated in a telephonic mediation with JAMS mediator Linda Singer. The  
7 participants included Chris Bandas, Caroline Tucker, Albert Bacharach, and Steven Helfand,  
8 along with *pro se* objector Thompson. Class Counsel made repeated efforts to persuade Mr.  
9 Frank to participate in the mediation, which he refused.

10 45. Class Counsel does not now know whether objector mediation participants will  
11 formally withdraw their objections, but each, except for Helfand, confirmed to Class  
12 Counsel and the mediator that a reduced \$14.5 million request was acceptable to them and  
13 reasonable.

#### 14 **CAFA Notice**

15 46. The required CAFA Notice was delivered to the Attorney Generals of the  
16 United States for all 50 states, the District of Columbia, and the United States Territories;  
17 the United States Department of Justice; and perhaps most important to the Office of the  
18 Comptroller of the Currency (“OCC”), which the Court is fully aware is the chief regulator  
19 of BANA, pursuant to the NBA. The purpose of CAFA notice is to protect class members  
20 from being involved in a settlement that may be deemed unfair or inconsistent with  
21 regulatory policies, and to protect consumers from class action abuse, particularly  
22 settlements that generate large attorney’s fees which consume most of the economic value of  
23 the settlement. Notably, none of those authorities have objected to the Settlement, including  
24 Class Counsel’s application for attorneys’ fees.

#### 25 **Attorneys’ Fees**

26 47. In the time since filing Plaintiffs’ Attorneys’ Fee and Cost Application, Class  
27 Counsel has spent significant additional time on this matter. Tycko & Zavareei (“TZ”) has  
28

1 already exceeded all of the estimated future hours listed in the Application, and has spent an  
2 additional 164.30 hours on top of that communicating with Settlement Class members and  
3 objectors, preparing for and attending mediation with objectors, and working on the Motion  
4 for Final Approval and Plaintiffs' Response to Objections. This amounts to a lodestar  
5 increase of approximately \$73,515.90 over their estimate in the Application.

6 48. Kopelowitz Ostrow Ferguson Weiselberg Gilbert ("KO") has likewise  
7 exceeded all of the estimated future hours listed in the Application, and has spent an  
8 additional 144.25 hours on top of that communicating with Settlement Class members and  
9 objectors, preparing for and attending mediation with objectors, and working on the Motion  
10 for Final Approval and Plaintiffs' Response to Objections. This amounts to a lodestar  
11 increase of approximately \$104,581.25 over KO's estimate in the Fee Application.

12 49. Creed & Gowdy ("CG") has likewise exceeded all of the estimated future hours  
13 listed in the Application, and has spent an additional 37 hours on top of that communicating  
14 with Settlement Class members and objectors, preparing for mediation with objectors, and  
15 working on the Motion for Final Approval and Plaintiffs' Response to Objections. This  
16 amounts to a lodestar increase of approximately \$25,900.00 over CG's estimate in the Fee  
17 Application.

18 50. Kelly/Uustal, PLC ("KU") has likewise exceeded all of the estimated future  
19 hours listed in the Fee Application, and has spent an additional 18.2 hours on top of that  
20 communicating with Settlement Class members and objectors, preparing for and attending  
21 mediation with objectors, and working on the Motion for Final Approval and Plaintiffs'  
22 Response to Objections. This amounts to a lodestar increase of approximately \$10,525.50  
23 over KU's estimate in the Fee Application.

24 51. In total, after subtracting for "future time" already accounted for in the  
25 Attorneys' Fee and Cost Application, Class Counsel's total lodestar has increased by  
26 approximately \$214,522.65 to a total of approximately \$1,642,570.15 in the time since filing  
27 the Fee Application.

52. This revised lodestar does not include any additional future time for appearing at the Final Approval hearing or defending the Settlement on appeal. From TZ's recent experience defending final approval of a class action settlement that was attacked on appeal by Frank, TZ has spent an additional 104.4 hours *after* the final approval briefing, and the appeal has yet to be argued in that matter. Additionally, TZ has co-counsel in that matter which has spent even more time in the appellate proceedings, so it is conservative to estimate that Class Counsel will spend at least another 200 hours on this matter after filing the Final Approval brief, if Frank attacks final approval on appeal.

We declare under penalty of perjury that the foregoing is true and correct.  
Signed on May 30, 2018.

/s/Jeff Ostrow

JEFF OSTROW

KOPELOWITZ OSTROW

FERGUSON WEISELBERG GILBERT

Fort Lauderdale, Florida

/s/ Hassan Zavareei

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